

1 IN THE SUPREME COURT OF THE STATE OF MONTANA

2 No. 00-813

3 STATE, EX REL. DEWEY,

4 Petitioner,

5 v.

6 EIGHTH JUDICIAL DISTRICT COURT,
7 CASCADE COUNTY,

8 Respondent.

FILED

DEC 20 2000

Ed Smith
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STATE OF MONTANA

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9
10 **RESPONSE TO PETITION FOR
WRIT OF SUPERVISORY CONTROL**

DEC 2 - 2000

OF MONTANA

11
12 In accordance with this Court's orders of November 28, 2000 and
13 December 5, 2000, the Attorney General submits the following response to
14 the Petition for Writ of Supervisory Control filed by Thelma J. Dewey.

15
16 **BACKGROUND**

17 Thelma Dewey is a 42-year-old white female who has been diagnosed
18 as a paranoid schizophrenic. In November 2000, Ms. Dewey ceased taking
19 medication prescribed for her illness and her mental health deteriorated
20 significantly. As a result, the Cascade County Attorney's office filed a
21 Petition seeking to have Dewey committed to a mental health facility for a
22 period not to exceed 90 days. (D.C. Doc. 1.) The petition further requested
23 that a mental evaluation be performed by Dr. James Day, and that the
24 Cascade County Public Defender's Office be appointed to represent
25 Ms. Dewey.

26 Ms. Dewey was admitted to Benefis Healthcare in Great Falls on
27 November 17, 2000, and was examined by Dr. Day. Dr. Day prepared a

1 report which documents a long history of schizophrenia, drug abuse, and
2 poor compliance treatment recommendations. The report states that
3 Ms. Dewey was seen at the Mental Health Center on November 16, 2000 and
4 was "quite obviously extremely psychotic and almost completely nonsensical
5 in her conversation." (D.C. Doc. 4.) The report also indicates that Dewey's
6 live-in boyfriend, Arthur Kirkland, reported that the patient had struck him
7 several times and made threats to hurt him during the night; that Dewey left
8 burners on without any recognition of possible danger; and that she left lit
9 cigarettes and matches all about the house.

10 A hearing on the State's petition was held on November 23, 2000,
11 before District Judge Kenneth Neill. Dr. Day was the only witness who
12 testified at the hearing. Although Petitioner's counsel requested a transcript
13 of that proceeding, none has yet been filed with this Court. The court
14 minutes reflect that Petitioner's counsel objected to a finding that Dewey is a
15 danger to herself or others because she did not have the opportunity to
16 cross-examine Arthur Kirkland, whose information was contained in
17 Dr. Day's report.

18 Despite the objection, Judge Neill ordered that Thelma Dewey be
19 committed to the Montana State Hospital for a period not to exceed ninety
20 (90) days. Judge Neill issued his Findings of Fact, Conclusions of Law and
21 Order that same day, in which the court found that Dewey suffers from a
22 serious mental illness, diagnosed as schizophrenia, paranoid type, and that
23 she was a threat to herself and others in the community because of her refusal
24 to take her medication. The court suspended the commitment, however, on
25 the condition that Dewey immediately begin participation in mental health
26 treatment in Great Falls, Montana, including inpatient placement,
27

1 prescription medicines, and therapy as recommended by Dr. James Day and
2 other treating physicians. D.C. Doc. 6.

3 That same day, Dewey filed a Notice with the district court indicating
4 her intention to file a petition for supervisory control. The petition was filed
5 with this Court on November 24, 2000. Dewey claims that the district court
6 was unjustified in issuing an order of commitment based on hearsay
7 statements of Arthur Kirkland contained in Dr. Day's report. It appears that
8 Dewey's counsel did not have the district court's findings or conclusions
9 when he prepared the Petition for Supervisory Control. See 12/5/00 Order
10 (indicating that the district court's Findings of Fact, Conclusions of Law and
11 Order were issued two days after the petition was filed). As relief, Dewey
12 requests that she be immediately released from confinement and that the
13 petition be dismissed.

14 Three days after the petition was filed, on November 27, 2000, Dewey
15 was released from inpatient treatment in Great Falls pursuant to Dr. Day's
16 orders. See Aff. of Dr. James Day, attached.¹ Dewey is currently
17 participating in outpatient care at New Directions Center in Great Falls. She
18 lives independently in the community and is reportedly responding well to
19 her treatment and medications. Id.

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25 _____

26 ¹ At the time this response was prepared, Dr. Day was unavailable to sign
27 the affidavit which he had dictated to the Cascade County Attorney's Office.
Once the affidavit is signed, the Cascade County Attorney's Office will mail
it to the Clerk of the Supreme Court for filing.

1 **DISCUSSION**

2 **THE PETITION FOR SUPERVISORY CONTROL SHOULD BE**
3 **DENIED.**

4 **A. Standards for Exercising Supervisory Control**

5 A writ of supervisory control is an extraordinary remedy that is
6 “sometimes justified by circumstances of an emergency nature, as when a
7 cause of action or right has arisen under conditions making due consideration
8 in the trial courts and due appeal to this court an inadequate remedy, or when
9 supervision of a trial court other than by appeal is deemed necessary or
10 proper.” Mont. R. App. P. 17(a). The elements governing this Court’s
11 exercise of original jurisdiction pursuant to Rule 17 are as follows: (1) that
12 constitutional issues of major statewide importance are involved; (2) that the
13 case involves purely legal questions of statutory and constitutional
14 construction; and (3) that urgency and emergency factors exist making the
15 normal appeal process inadequate. State ex rel. Gould v. Cooney, 253 Mont.
16 90, 92, 831 P.2d 593, 594 (1992). This Court clarified those standards in
17 State ex rel. Plumb v. Fourth Judicial District Court, 279 Mont. 363, 927 P.2d
18 1011 (1996), stating that an appropriate function of supervisory control is:
19 to control the course of litigation in the inferior courts where those
20 courts are proceeding within their jurisdiction, but by a mistake of law,
or willful disregard of it, are doing a gross injustice, and there is no
appeal, or the remedy by appeal is inadequate.

21 Id., 279 Mont. at 368-69, 927 P.2d at 1014, citing State ex rel. Whiteside v.
22 District Court, 24 Mont. 539, 63 P. 365 (1900).

23 **B. Relevant Statutory Procedure**

24 The procedure for committing a person who is seriously mentally ill
25 are contained in Mont. Code Ann. Title 53, chapter 21, part 1. Following an
26 initial hearing to determine probable cause, the district court must hold a
27 formal hearing on the State’s petition in accordance with Mont. Code Ann.

1 § 53-21-126. The hearing is limited to a determination of “whether or not the
2 respondent is suffering from a mental disorder and requires commitment.”

3 Mont. Code Ann. § 53-21-126(1). If the court finds that the person is
4 suffering from a mental disorder, it must then consider whether commitment
5 is necessary. In making that determination, the court must consider:

- 6 (a) whether the respondent, because of a mental disorder, is
7 substantially unable to provide for the respondent’s own basic
needs of food, clothing, shelter, health, or safety;
- 8 (b) whether the respondent has recently, because of a mental
9 disorder and through an act or an omission, caused self-injury or
injury to others;
- 10 (c) whether, because of a mental disorder, there is an imminent
11 threat of injury to the respondent or to others because of the
respondent’s acts or omissions; and
- 12 (d) whether the respondent’s mental disorder, as demonstrated by
13 the respondent’s acts or omissions, will, if untreated, predictably
14 result in deterioration of the respondent’s mental condition to the
point at which the respondent will become a danger to self or to
15 others or will be unable to provide for the respondent’s own
basic needs of food, clothing, shelter, health, or safety.
16 Predictability may be established by the respondent’s relevant
medical history.

17 Mont. Code Ann. § 53-21-126(1)(a)-(d).

18 The standard of proof at the hearing is beyond a reasonable doubt with
19 respect to any physical facts or evidence and clear and convincing evidence
20 as to all other matters. Mont. Code Ann. § 53-21-126(2). The respondent’s
21 mental disorder must be proved to a reasonable medical certainty. Imminent
22 threat of self-inflicted injury or injury to others must be proven by overt acts
23 or omissions, sufficiently recent in time as to be material and relevant as to
24 the respondent’s present condition. Id.

25 The professional person appointed by the court, in this case, Dr. Day,
26 must be present for the hearing and subject to cross-examination. Mont.
27 Code Ann. § 53-21-126(3). The written report of the professional person

1 indicating the diagnosis “may be attached to the petition, but any matter
2 otherwise inadmissible, such as hearsay matter, is not admissible merely
3 because it is contained in the report.” Id.

4 At the hearing, the professional person may testify as to the ultimate
5 issue of whether the respondent is suffering from a mental disorder and
6 requires commitment. In addition, there must be evidence from the
7 professional or other persons from which the court can determine the factors
8 outlined in subsection (1), which are set forth verbatim above. Mont. Code
9 Ann. § 53-21-126(4).

10 **C. Discussion**

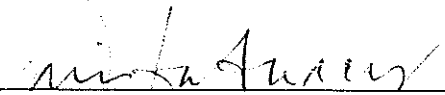
11 In this case, Petitioner challenges the order of commitment claiming
12 that the district court erroneously relied on hearsay evidence from
13 Arthur Kirkland, as contained in Dr. Day’s written report, when determining
14 that she posed an “imminent threat of self-inflicted injury or injury to others”
15 by “overt acts or omissions.” It is not clear from the record, however,
16 whether the district court in fact relied on hearsay evidence from
17 Arthur Kirkland when making its determination that Dewey required
18 commitment, or whether the court was persuaded by direct testimony from
19 Dr. Day. The district court found that: “Respondent has engaged in
20 continuing behavior that threatens others and endangers the community; the
21 behavior is consistent with mental illness; and, there is no evidence to
22 indicate the behavior will change.” Without a transcript of the proceedings,
23 however, it is impossible to know the factual basis of the court’s finding and
24 whether a mistake of law was, in fact, committed.

25 Respondent proposes that this Court reserve the writ of supervisory
26 control for situations where there is clear error by the district court, especially
27 in this case where the following circumstances exist: (1) Dr. Day’s report

1 clearly documents psychosis and Dewey's inability to function without
2 medication; (2) the district court suspended the commitment upon conditions;
3 (3) Dewey is living independently in the community and is doing well on her
4 medications; and (4) the district court's order will expire in February 2001.
5 Given these circumstances, it is questionable whether the district court's
6 order, even if based on hearsay evidence, has resulted in a gross injustice.
7 For these reasons, Respondent respectfully urges this Court to deny the writ
8 of supervisory control.

9 Respectfully submitted this 19th day of December, 2000.

10 JOSEPH P. MAZUREK
11 Montana Attorney General
12 Justice Building
13 215 North Sanders
14 P.O. Box 201401
15 Helena, MT 59620-1401

14 By: 
15 JENNIFER ANDERS
16 Assistant Attorney General

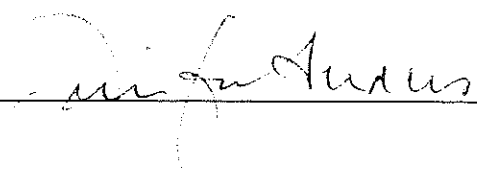
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18 **CERTIFICATE OF SERVICE**

19 I hereby certify that I caused a true and accurate copy of the foregoing
20 Response to Petition for Writ of Supervisory Control to be mailed to:

21 Mr. Carl Jensen Jr.
22 Public Defender
23 Cascade County Courthouse
24 415 Second Avenue North
25 Great Falls, MT 59401

24 Mr. Brant S. Light
25 Cascade County Attorney
26 121 Fourth Street North
27 Great Falls, MT 59401

27 DATED: 12/19/00



MARVIN ANDERSON
DEPUTY CASCADE COUNTY ATTORNEY
121 FOURTH STREET NORTH
GREAT FALLS, MT 59401
406-454-6915
ATTORNEY FOR PLAINTIFF

MONTANA EIGHTH JUDICIAL DISTRICT COURT, CASCADE COUNTY

AFFIDAVIT OF DR JAMES DAY

7. On November 22, 2000, Dr. Day began treatment of Ms. Dewey at Benefis Healthcare in the psychiatric ward.
8. He prescribed the antipsychotic medication olanzapine, as well as psychiatric psychotherapy.
9. On November 27, 2000, Ms. Dewey was released from inpatient care at the hospital.
10. Dr. Day ordered her to participate in outpatient care at New Directions Center under the supervision of staff therapist, Richard Leffel.
11. Since then, Ms. Dewey has participated in weekly outpatient therapy sessions with therapist Leffel and other staff members.
12. In addition, she is in the Medication Management program where she visits New Directions daily to receive her antipsychotic medications prescribed by Dr. Day and dispensed by certified nursing staff.
13. Ms. Dewey lives independently in the community and responds well to her treatment and medications.

DATED the _____ day of December, 2000.

DR. JAMES DAY

SUBSCRIBED AND SWORN TO before me on this _____ day of December, 2000.

Notary Public for the State of Montana
Residing at Great Falls, Cascade County, MT
My commission expires _____